STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 18, 2000
v	No. 209345 Kent Circuit Court
ANDRE TERRELL FRAZIER, Defendant-Appellant.	LC No. 97-007796 FC

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Defendant Andre Terrell Frazier was charged with three counts of first-degree murder, MCL 750.316; MSA 28.458, three counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and five counts of possession of a firearm in the course of committing a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, defendant was convicted of one count of first-degree murder and two counts of second-degree murder, MCL 750.317; MSA 28.549, three counts of assault with intent to commit murder, and five counts of possession of a firearm in the course of committing a felony. He appeals as of right. We affirm.

This appeal arises from an attack which took place in Grand Rapids in the early morning on July 5, 1997, in which three men, Fred Williams, Robert Earl Marion, and Donte Jones, were killed, Marion's sisters, Latasha and Latisha Whitehead, were injured, and Ellis Williams was shot at. Ellis Williams had been told by defendant the previous day that someone had tried to rob him; he then warned Williams to stay away from "Earl," "Williams," and "Boo." Williams saw defendant again a short time before the shooting. At this time, Williams was with Fred Williams, who was his uncle. Defendant again warned Williams to stay away from the people who robbed him. Williams and his uncle went to Earl Marion's house to drink beer and play video games. Donte Jones was also present. Marion's sisters were sleeping upstairs.

Sometime after Williams and his uncle arrived, defendant came to Marion's house. He repeatedly told the group that he had a lot of money and they could take it. Jones and Marion told defendant that they did not want his money. After several exchanges, defendant pulled a gun and shot Jones, Marion, and Fred Williams. Although Williams saw fire jump from defendant's gun when

defendant shot at him, he was not hit; nonetheless, Williams slumped over as if shot. He watched defendant walk upstairs. Williams then fled to a friend's house.

Latasha Whitehead had awakened to hear the shots. She got out of bed and saw defendant coming up the stairs. When defendant reached the top of the stairs, he shot Latasha, then knocked her down and began beating her. Latasha's sister, Latisha, had awakened to hear the shot. She went to Latasha's room and found defendant beating her sister. Latisha tried to pull defendant off, defendant hit her and knocked her down. He then picked up a mirror and threw it to the floor, breaking it into pieces. Defendant picked up one of the pieces and began slashing at both Latasha and Latisha. Latisha ran down the stairs with defendant following and slashing at her. Defendant ran past Latisha and out the door. Latisha ran downstairs and tried to wake her brother. She then ran next door, where the neighbors let her in. She told them that "Black," a name by which defendant was known, had hurt her.

When police arrived at the scene, Williams returned and told them what had occurred. At approximately the same time police were dispatched to the scene of the offenses, officer Richard Atha received a report of a possible shooting or stabbing. He went to the 500 block of Gilbert Street, a short distance from the scene of the murders, where he found defendant with a medium-sized wound in his hand. Defendant told him that he had been at the scene of the murders when "Shaylin" came in and shot Fred Williams and Marion. Defendant cut his hand while wrestling with "Shaylin." Richard Schultz, who had also responded to the dispatch, photographed defendant, then went to the scene of the murders, where he showed the photograph to Williams. Williams identified defendant as the person who had committed the offenses. Shortly thereafter, defendant was placed under arrest.

Defendant contends that he was denied effective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant filed a motion to remand for a hearing to make a testimonial record under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). This Court denied the motion. Defendant challenges this ruling, saying that a hearing should have been ordered. In support of his claim, defendant has attached to his brief numerous documents which, he claims, support the conclusion that a hearing should be held. We note that none of the documentary material attached to defendant's brief was appended to either the motion to remand or the "offer of proof" filed with this Court. The offer of proof consisted of a two-page, unverified statement of counsel that trial counsel had been ineffective because he failed to investigate and interview potential witnesses. It did not purport to tell this Court what the additional investigation would have revealed or who the potential witnesses were. While defendant has now appended material to his brief to support his claim, this Court cannot consider material attached to briefs that was not a part of the lower court record. *People v Pawelczak*, 125 Mich App 231, 241; 336 NW2d 453 (1983). Our original ruling was correct based on the material filed. We decline to revisit our ruling on defendant's motion to remand. As a result, review of his claim is foreclosed unless

the record contains sufficient detail to support defendant's position. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

Defendant first claims that counsel was ineffective for failing to request formal discovery under MCR 6.201. There is nothing to show that defendant did not receive material to which he would have been entitled under this rule. Defendant contends that had counsel conducted discovery, he would have found that Williams had a conviction for giving false information to a police officer. Defendant supports his claim by a document attached to his brief; we cannot consider this document. *Pawelczak*, *supra*, 241. In addition, this conviction would have been discoverable under MCR 6.201 only if the prosecutor had intended to use it to impeach Williams. The prosecutor did not use the conviction for any purpose. Moreover, in a case in which defendant was identified by three victims as the person who committed the offense, it is highly unlikely that this evidence could have altered the outcome of the case.

Defendant next argues that counsel was ineffective for failing to discover the criminal records of Shelton Williams, who defendant contends is the "Shaylin" to whom he referred when he spoke to police. These claims are supported only by documents attached to his brief; they cannot be considered. Defendant also argues that counsel was ineffective for failing to introduce any evidence concerning "Shaylin." Counsel could have decided as a matter of trial strategy not to introduce this evidence, given the unequivocal identification testimony from three witnesses. We will not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Defendant contends that counsel was ineffective for failing to investigate an anonymous tip that someone left the house without a shirt on; the record indicates that defendant was wearing a shirt at the time of the attacks. There is nothing showing that counsel did not make such an investigation. Defendant also argues that counsel should have called William Corner, the detective who received the tip. Decisions concerning what evidence to present and what witnesses to call is a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997).

Defendant argues that counsel was ineffective because he did not call three police witnesses, Karen Streeter, Corner, and Phillip Betz, when the prosecutor said he would not be calling them as witnesses. There is nothing in the record that indicates that these witnesses would have testified to anything that was not cumulative of the testimony of other witnesses. To the extent that they would have presented any different evidence, the decision not to call witnesses is trial strategy.

Defendant contends that counsel was ineffective for not introducing a hospital report that contained information that the Whitehead sisters had spoken with one another about the incident. However, Latisha Whitehead admitted that she and her sister had spoken about what occurred. The hospital report would only have been cumulative.

Finally, defendant points out that trial counsel has been formally reprimanded by the state bar on other occasions. We find this irrelevant. The question is whether counsel provided effective assistance in this case, not whether he violated disciplinary rules in the past. Defendant has failed to show that he was denied effective assistance of counsel.

Defendant contends that the court erred in admitting evidence that he was involved in drug sales, that the prosecutor improperly commented on this evidence, and that the court erred in failing to give a limiting instruction on the use of this evidence. Defendant did not object at any point to this evidence. We will review defendant's claim of error only if the error could have been decisive of the outcome or unless it falls under the category of cases in which harm is presumed or reversal is automatic. *People v Grant*, 445 Mich 535, 552; 520 NW2d 123 (1994). In this case, defendant argues that the evidence of drug sales was inadmissible only because the prosecutor failed to give the notice required by MRE 404(b)(2). This claim, and the evidence involved, does not call for review of defendant's claim. As for defendant's claim concerning the prosecutor's argument, defendant's failure to object forecloses review of his claim unless an instruction to disregard could not have eliminated the prejudicial effect or the failure to review the claim would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). In this case, the prosecutor used evidence of drug sales to surmise that defendant would have carried a gun; however, he then said, "I can't speak to that, however." He did not return to this argument. Although improper, the argument was not stressed or returned to by the prosecutor. We conclude that although the argument was improper, an instruction to disregard could have cured the prejudicial effect. Moreover, the argument was harmless. Finally, defendant contends that the court should have given a limiting instruction. A defendant seeking reversal of a conviction for a forfeited claim of nonconstitutional error in jury instructions must show plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Courts have no duty to sua sponte give a limiting instruction. *People v Chism*, 390 Mich 104, 120-121; 211 NW2d 193 (1973); *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). There was no error in the instructions.

Defendant also argues that counsel was ineffective for failing to object to the evidence or argument or for failing to request a limiting instruction. This claim was not raised in the statement of questions presented, and as a result presents nothing for review. *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995). Moreover, we have reviewed the ineffectiveness claim and conclude that it is without merit because it is unlikely that, even if defendant had objected to the evidence and argument and requested the limiting instruction, a different outcome would have resulted.

Defendant contends that the trial court abused its discretion in admitting into evidence a shell casing and a "butt plate" found in Latasha Whitehead's bedroom; the casing was later identified as having been fired by the gun that was found in the search on the day of the shooting. We disagree. Defendant did not object to the introduction of this evidence; as a result, review is foreclosed unless the failure to review the claim would result in manifest injustice. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). No manifest injustice would result in this case. The evidence now challenged was found in a search conducted on July 18, thirteen days after the police initially searched the scene. Defendant contends that there was no evidence that the condition of the premises was the same on July 18 as on July 5. In fact, there was no express testimony either that the premises had been altered or had not been altered. Moreover, there was nothing to indicate that the cartridge or "butt plate" had been placed at the scene between the two searches. Real evidence is admissible once it is shown to a reasonable degree of certainty to be what its proponent claims. *People v White*, 208 Mich App 126, 130-131; 527 NW2d 34 (1994). In this case, the cartridge and "butt plate" were shown to

a reasonable degree of certainty to be evidence connected with the offenses. No manifest injustice exists.

Affirmed.

/s/ David H. Sawyer
/s/ Roman S. Gribbs
/s/ Gary R. McDonald